

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Retention by Broadcasters of)	MB Docket No. 04-232
Program Recordings)	

August 27, 2004

SUPPORT OF RETENTION BY BROADCASTERS OF PROGRAM RECORDINGS

Few would dispute that local broadcasters are a primary source of political information for the American public. Indeed, the broadcasters have submitted numerous surveys to Congress and the FCC over the years proving just that point. The question is: are mechanisms in place to make that power transparent and thus accountable to the American public? The answer to that question, resoundingly, is no.

The field of political communication, for example, studies mass media. One of its major research goals is to study the relationship between media claims and actual media practice. For local TV broadcasters, this has been almost impossible to do. The vast majority of scholarly studies of mass media center on daily newspapers because they are readily searchable via commercial database providers such as Nexis and Factiva, and are also stored on microfiche at major university libraries and at the Library of Congress (which keeps comprehensive records of more than 300 daily newspapers). There are also a fair number of studies of network TV broadcasting, partially because transcripts of network news and public affairs shows are now readily available via commercial databases, but also because of the Vanderbilt Archives, which for several decades has kept archives of network TV news. The Copyright Act of 1976, after a long fight with network TV broadcasters, created a provision to allow this type of archive, which, extremely limited as it is, fostered a generation of research on network TV news.

Nothing similar exists for local TV news. Consequently, the studies of local broadcasting are few and far between. The scholarly cost-benefit analysis just doesn't warrant it. The only exception are a handful of major scholars who have received large grants to record and archive local TV programs in real time. These studies, which can be hundreds of times more expensive than comparable studies of local newspapers, tend to have extremely circumscribed topics because of their small number and the inability to do any retrospective research. To my knowledge, there is no other political science field where scholars must, at such expense, suffer the burden of creating their own historical archives while doing research. The FCC's recent broadcast flag decision, making it illegal for scholars to retransmit local broadcast programming, including public affairs and ad coverage, has made this type of research all the more costly.

In the absence of an affordable archive, claims made for broadcast programming are unverifiable, with the consequence that the numerous journalistic ethics claims made by broadcast organizations become little more than what economists call and disparage as “cheap talk.” Journalistic ethics codes make grand claims about representing viewer interests and avoiding conflicts of interest stemming from the competing interests of advertisers, news sources, broadcast owners, and others.¹ Similarly, when reporters and station management face particular allegations of succumbing to such conflicts of interest, they routinely deny them as a violation of their ethical standards. But they also do not provide researchers with affordable, practical means to investigate the allegations. Broadcasters have even outright withheld tapes on sensitive matters, such as a broadcast segment that might land them in court on grounds of willful negligence or libel. In such cases, the problem is not that the broadcaster doesn’t have the tape and couldn’t reproduce a segment for a modest amount of money. The problem is that the broadcaster may have no rational interest in making itself accountable.

In short, broadcasters should not be allowed to have their cake and eat it too. They should not be able to get away with making grand claims of being public trustees while denying the public the very means necessary to verify their claims.

Needless to say, broadcasters use an extremely valuable public resource—the public airwaves—without any monetary compensation to the American public. The federal government requires significant disclosure of many industries that don’t even use a public asset. The financial industries regulated by the SEC are a classic example. There, it’s recognized that government mandated transparency is a critical feature of efficient capital markets. The same, as many political communication scholars will attest, is true of media markets. If the federal government can require public disclosure of many industries that don’t even use a public asset, it can surely require public disclosure of one that not only uses a public asset but also desperately needs transparency for the efficient and healthy functioning of our democracy.

Of course, in all matters, a cost-benefit equation must be considered. Archives, as the broadcasters have so often asserted, are not free. But the cost of such archives has dropped in recent years so as to be negligible. Of course, if the goal is to create a Ritz-Carlton archive, the cost will be higher than for a Motel 6. But a Motel 6 is perfectly fine for the purposes of eliminating the “cheap talk” that currently characterizes broadcasters’ public trustee claims.

The technology and economic conditions that fostered the FCC’s 1977 *Taping Decision* are almost unfathomably different from the world of today. Today, broadcast video records are ubiquitous. For example, TVW, the C-SPAN-like public affairs channel in Washington State with a budget only a tiny fraction that of the vast majority of commercial TV stations, has comprehensive public, Internet accessible, free audio archives going back to the late 1990s and similarly public comprehensive video archives

¹ For example, see the ethics codes endorsed by the Radio-TV News Directors Associations, the Society of Professional Journalists, the National Press Club, and the major TV networks.

from the early 2000s. Early archives are kept at phone modem speeds below 56 kbps, which is a lot lower than standard definition speeds (now about 1,000 kbps) but still adequate for viewing and accountability. In Anne Arundel County, Maryland, the non-profit public access TV station has 9 terabytes of data, enough to store approximately 9,000 hours of standard definition TV programming and more than 100,000 hours at lower resolution phone modem speeds. Today, DBS providers sell set top boxes with Tivo-like recorders for \$99. Those boxes, with 80 gigabytes of storage, could store many weeks worth of broadcast TV programming at phone modem speeds of 56 kbps.

It is clear from the broadcasting trade press that a large fraction of stations now have huge digital ("tapeless") programming archives that they use for their internal purposes. They also have essentially universal high-speed broadband connections. These digital archiving and networked systems could be used to 1) transfer programming to a local computer with a hard drive that would constitute a public archive, or, better yet, 2) transfer the archive to a central database operated by the FCC or the Library of Congress. The computer terminal, with a 100 gigabyte hard drive, could easily be purchased for under \$1,000 (e.g., a Dell Dimension 3000 with a 160 gigabyte hard drive costs under \$600). If storage is done remotely using a station's existing Internet service, economies of scale could minimize cost even further. For 56 kbps low definition video, the transfer of a day's worth of programming could be done in less than an hour during the wee hours of the morning when a station's Internet resources are underutilized.

Sony now sells a \$200 storage device with a DVD recorder, a VHS recorder, and a 80 gigabyte hard drive. DVD recordable disks, with a capacity of 4.7 gigabytes, now go for as low as \$1. That means a broadcaster could records days worth of phone modem quality TV on a \$1 disk.

Perhaps the best proposal to address the various concerns raised in this proceeding would be to have the Library of Congress collect comprehensive records of broadcasts just as it currently does with books, magazines, and newspapers. To do this affordably and with minimal loss of accountability and public information, the record could be kept at phone modem video quality. Broadcasters could transmit this information to the Library of Congress via their high-speed Internet connections or via media such as DVDs. Compared to physical publishers, which must send their works to the Library of Congress via an expensive physical medium such as mail, the Internet offers an automated and inexpensive distribution mechanism. In short, the Library of Congress's special broadcast exemption to archival storage should be eliminated.

This national archive could be supplemented with a short-term local archive as suggested in the NPRM. In our judgment, an archives' duration is more important than its resolution, so the Commission should ask for a longer duration of storage (several years) but at a lower level of resolution (phone modem quality). An alternative option might be to mandate a high fidelity archive for several months and then allow the resolution of that archive to automatically be reduced over a subsequent period of time. The fact that so many stations already keep digital archives and merely need to create a process to

transfer those files for consumer access should also be kept clearly in mind when estimating the cost of broadcaster transparency and public accountability.

Also important is the need to allow people to access an archive anonymously. Many local community members who might otherwise have concerns about broadcast programming will not investigate their reservations if they must identify themselves in doing so and risk the goodwill of their local broadcaster on whom they depend for personal, business, or political reputation. A prime and long recognized advantage of library archives is the creation of anonymous access.

In conclusion, the Commission asks whether this proceeding raises any First Amendment issues. The answer to this question is resoundingly “yes.” The Founders were deeply concerned that the public would lack the means to become well-informed about their democracy. It’s why they created a First Amendment and later instituted postal subsidies for newspapers. Today, commercial broadcasters are the recipients of vast public subsidies (most notably free use of the public airwaves) and an aggressive industrial policy (government mandated barriers to entry to prevent competition to free, over-the air TV). Fostering media accountability through greater media transparency is a natural extension of these First Amendment values.

Some of the proposals discussed here are discussed in more depth in: James H. Snider, “Local TV News Archives as a Public Good,” *Harvard International Journal of Press/Politics* 5(2): 111-117. Available online at http://www.newamerica.net/Download_Docs/pdfs/Doc_File_1892_1.pdf. That article also includes a discussion of relevant copyright issues and provides citations to the literature on the 1970s legislative battle that led to the creation of the Vanderbilt TV Archives and the codified principle that broadcast archives are vital in a modern democracy so dependent on broadcasters for their information.

Sincerely,

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